



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 63 OF 2020**

**BERNARD NJOROGE KIBAKI T/A NJOWA NJEMU ENTERPRISES....APPELLANT/APPLICANT**

**VERSUS**

**1. EQUITY BANK LIMITED)**

**2. TREVO AUCTIONEERS ).....RESPONDENTS**

**RULING**

1. The application for consideration before this court is the Appellant's **Notice of Motion** dated **29<sup>th</sup> May, 2020**. The same is expressed to be brought under **Sections 1A, 1B and 79G** all of the **Civil Procedure Act, Order 42 Rule 6(1) and (2), Order 50 and Order 51**, all of the **Civil Procedure Rules**. By the Application, the Appellant/Applicant seeks the following orders:-

*a) Spent.*

*b) Spent.*

*c) That there be a Stay of Execution pending the hearing and determination of the Appellant's Appeal herein.*

*d) That the costs of this application be provided for.*

2. The **Motion** is supported by the grounds presented on its body and the **Affidavit** of **Bernard Njoroge Kibaki**, the Appellant/Applicant. He averred that he had sued the Respondents in **Mombasa SRMCC No.1183 of 2016** wherein **Judgment** was delivered on **30<sup>th</sup> April, 2020**. That the Judgment was delivered in his absence and in the absence of his advocate and therefore no Stay was then applied for or granted by the court.

3. **Mr. Bernard** depones that he is aggrieved by the decision that was rendered by the trial court and has preferred the instant Appeal which may be rendered nugatory if this court does not grant the orders of temporary Stay of Execution.

4. He also averred that the 1<sup>st</sup> Respondent holds his **Title** to **Land No. 10627/II/MN CR.49133** and **Log book** to Motor Vehicle Registration **No. KBK 486Z** and may move to sell the said properties if an interim Stay pending the Appeal is not granted.

5. According to the Appellant/Applicant, he has not refused to pay the amount of loan owing to 1<sup>st</sup> Respondent but had only asked for rescheduling of the debt and if Stay of Execution is not granted he will be evicted from his home.

6. The Respondents opposed the Application by filing joint Grounds of Opposition dated and filed on **20<sup>th</sup> July 2020**. The grounds are:-

*a) The application is misconceived and incapable of granting since it seeks to stay execution of a negative order which merely dismissed the suit.*

*b) It is inequitable to grant any order to curtail the 1<sup>st</sup> Respondent's Statutory Power of Sale since the loan continues to grow to the prejudice of both the 1<sup>st</sup> Respondent and the Appellant.*

*c) The Appellant is undeserving of the equitable relief he seeks having failed to repay even a single shilling, since he admittedly obtained coming to court, towards reducing the loan he admittedly obtained from the 1<sup>st</sup> Respondent.*

**d) There is no substantial loss or irreparably injury that the Appellant will suffer nor will the appeal be rendered nugatory by the sale of the security.**

7. Following the directions given by the court, the matter was disposed of by way of written submissions. The Appellant's/Applicant's submissions are dated and filed on **28<sup>th</sup> July 2020** whilst the Respondents submissions are dated and filed on **20<sup>th</sup> July 2020**.

8. The Appellant/Applicant's submissions rehashed the grounds deponed in support of the application and further added that it will be erroneous to let the Respondents sell the subject properties. According to the Appellant/Applicant, the subject suit properties, *to wit*, **Title to Land No. 10627/II/MN CR.49133** and **Log book** to Motor Vehicle Registration **No.KBK 486Z**, were not meant to be securities for the loan in contention but were securities to loans which the Applicant has already paid in full and therefore the 1<sup>st</sup> Respondent's Statutory Power of Sale cannot arise in the circumstance.

9. It is submitted that the trial court failed to determine whether the subject properties were securities to the loan in contention or whether they were securities to loans which had already been repaid. That the same issue is the basis of the instant Appeal and there is need to preserve the said properties pending the determination of the Appeal.

10. The Respondents on the other hand pointed out two issues for determination namely:-

**a) Whether a Stay of Execution of the Judgment can be granted; and**

**b) Whether the Statutory Power of Sale should be suspended.**

11. On the first issue, it is submitted that it is a settled principle in law that there can be no Stay of a negative order hence this court cannot grant the orders sought. In support of this line of argument, reliance is placed on two cases, the first one being the case of **Catherine Njeri Maranga ...Vs... Serah Chege & Another [2017]eKLR**, where the court expressed thus:-

***"...The Applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the Applicant has lost. The refusal simply means that the Applicant stays in the situation he was before coming to court and therefore the issues of substantial loss that he is likely to suffer and the appeal being rendered nugatory does not arise"***

12. The second is the case of **Electro Watts Limited..Vs..Alios Finance Kenya Limited [2018]eKLR**, where the Court went on to state that:-

***"...the exercise of Statutory Power of Sale was not an Order emanating from the court that could have been executed. Rather, it was a right that would crystalize if the Appellant defaulted in repaying the loan it had been advanced by the Respondent to purchase the generator"***

13. As for whether the Statutory Power of Sale should be suspended, it is submitted that the relief was not expressly sought by the Appellant and this court lacks jurisdiction to grant such a relief. This position is buttressed by an excerpt from the case of **Kenya Ports Authority... Vs...Autopress Limited & 2 Others [2016 eKLR]**, where the Court observed thus:-

***"...there was no jurisdiction to award a relief which had not been sought for by a party to any proceedings... this principle binds both the litigant and the court."***

14. It is further submitted that the 1<sup>st</sup> Respondent advanced the Appellant **Kshs.4,260,000/=** and the loan has not been repaid since **23<sup>rd</sup> June 2016**. As such, the Appellant must do equity before he seeks equity. The Respondents reiterate the finding of the trial court that failure by the Appellant to pay the loan is a demonstration of bad faith. That further delay in repaying the loan is injurious to both parties, since the loan continues to accrue interests, and at the same time diminishing the Respondent's security.

15. In conclusion, the Respondents argue that the application is bereft of merit and should be dismissed. To buttress the submissions reliance was placed on the cases of **John Mwashigadi Mwakisha...vs...Housing Finance Co. Ltd [2020]eKLR**, and **Mrao Ltd...Vs...First American Bank of Kenya Ltd & 2 Others [2003]eKLR**.

### **Analysis and Determination**

16. Having set out the respective parties' positions as above, in the circumstances, it is my most considered view that the sole issue for determination is whether or not, in the circumstances, I ought to grant Stay of Execution of the **Judgment** of the Magistrates Court delivered on **30<sup>th</sup> April, 2020** pending the hearing of the Appeal.

17. **Order 42 Rule 6** of the **Civil Procedure Rules, 2010** specifies the

circumstances under which the court may order Stay of Execution of a Decree or Order pending an Appeal. It provides that an Applicant must demonstrate the following:-

**a) Substantial loss may result to the applicant unless the order was made;**

b) *The application was made without unreasonable delay; and*

c) *Such security as the court orders for the due performance of such decree or order as may ultimately binding on him has been given by the applicant.*

18. From the above provision, it is clear that the court must be satisfied that there is “sufficient cause” to grant a Stay. Evidently, the three (3) prerequisite conditions set out in the said **Order 42 Rule 6** of the **Civil Procedure Rules, 2010** cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously.

19. The above finding notwithstanding, we cannot lose sight of the fact that the **Judgment** that the Applicant seeks to Stay is the **Judgment** of the trial Magistrates Court issued on **30<sup>th</sup> April 2020** dismissing the Applicant’s case. It was a negative order.

20. Having said so, this Court noted that the Judgment the trial court granted was not a positive order. As rightly submitted by the Respondent, a negative order is incapable of being Stayed as the Appellant seeks. I am guided by the Court of Appeal decision in the case of **Kaushik Panchamatia & 3 Others...Vs...Prime Bank Limited & Another [2020]eKLR**. As the Court reiterated and which I fully adopt, that;

*“...that a negative order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by applicants.”*

21. Similarly, in the case of **Western College Farts and Applied Sciences...Vs... Oranga & Others [1976]KLR 63**, the Court whilst considering whether an Order of Stay can be granted in respect of a negative order and which we fully adopt stated *inter alia* as follows:-

*“But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs.....”*

*The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction.”*

22. Accordingly, there is nothing to stay in the present case. The trial court in the **Judgment** dated **30<sup>th</sup> April, 2020** merely dismissed the suit with costs. Therefore, the only execution which can flow from the said Judgment is with respect to cost since the trial court did not order any of the parties to do anything or to refrain from doing anything or to pay any sum. It therefore, follows that in light of the above discussion, this Court has no mandate to grant a Stay Order in the manner prayed for by the Applicant.

23. I have also not lost sight of the argument by the Applicant that if Stay is not granted, there is a likelihood of the Respondents selling his properties namely, **Land No.10627/II/MN CR.49133** and **Motor Vehicle Registration No.KBK 486Z** which were not in the first place meant to be security for the loan in contention.

24. The Appellant argued that if this court does not intervene to prevent the Respondents from selling the suits properties, its Appeal will subsequently be rendered nugatory and further be prejudiced since its only home will have been sold.

25. In Response thereof, the Respondents submitted that there has been continuing security on the suit properties in different loans advanced to the Appellant and in any event, the exercise of Statutory Power of Sale is not an order emanating from the court so that it can be executed. The Respondents also submitted that the Appellant has not sought a relief to restrain the order of sale and as such this Court lacks jurisdiction to award what has not been sought.

26. To that extend, I entirely agree with the submissions of the Respondents.

**Section 2** of the **Civil Procedure Act** defines a Decree Holder as any person in whose favour a Decree has been passed or an Order capable of execution has been made, and includes the assignee of such Decree or Order. The definition alludes to an order that is capable of being executed. Bearing that in mind *vis-à-vis* the facts of this case, there was no Order and subsequent Decree capable of being executed.

27. The exercise of Statutory Power of Sale which the Appellant seeks to Stay did not emanate from the Judgment of the trial court delivered on **30<sup>th</sup> April, 2020**. Rather, it is a right that crystallizes when the borrower, in our case the Appellant/Applicant, defaults in repaying the loan it had been advanced by the lender, who in the instant case is the Respondent.

28. This is however not suggesting that this court cannot issue injunctive orders to stop a possible sale by the Respondents. Each case will be considered on its own merit but of importance an Applicant seeking to get and be granted a temporary injunction must establish a *prima facie* case with probabilities of success, must establish that he stands to suffer a loss irreparable by an award of damages if the injunction be refused and where the court is in doubt, it balances the convenience between the parties. These celebrated principles have been endorsed by the courts as the prerequisites underscoring the grant of temporary injunctions.

29. Unfortunately, the instant application does not have a prayer to that extent. Consequently, the court cannot award a relief which had not been sought for by the Appellant/Applicant herein through the instant application. It is not upon the court to speculate on what a party wants but each party must present the relief it seeks and its case in completeness. The same view was adopted by court in the case of **Galaxy Paints Co. Ltd... Vs... Falcon Guards Ltd [2002] 2EA 385**, where the Court observed thus:-

**“...that parties are bound by their pleadings and that the court will not grant a relief which has not been sought.”** (Emphasis Mine)

**Disposition**

30. For the foregoing reasons, the upshot of this court’s Ruling is that the Appellant/Applicant’s **Notice of Motion** application that is dated **29<sup>th</sup> May, 2020** and filed on **2<sup>nd</sup> June, 2020** is not merited and the same is hereby dismissed with costs to the Respondents.

31. For avoidance of doubt, the interim orders of Stay of Execution granted by Hon. Justice P. J. Otieno on **3<sup>rd</sup> June, 2020** and subsequently extended pending hearing and determination of the present application are hereby discharged, set aside and/or vacated.

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA on this 28<sup>th</sup> day of October, 2020.**

**D. O. CHEPKWONY**

**JUDGE**

**28/10/2020**

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.

**D. O. CHEPKWONY**

**JUDGE**

**28/10/2020**